



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL CASE NO. 33 OF 2012 (MURDER)**

REPUBLIC.....PROSECUTION

VERSUS

DIANA KARIMI NJERU.....ACCUSED

**J U D G M E N T**

1. The accused person was charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. It was alleged that on the 3/12/2012 at Rukinga estate, Siakago market in Mbeere North District of Embu County, she murdered one Peter Kariuki. A plea of not guilty was entered and the case proceeded for hearing.
2. The prosecution called 10 witnesses in this case. Eight (8) witnesses were heard by Ong'udi, J. I took over the case and heard the rest of the prosecution witnesses and the defence case.
3. The key witness PW6 was the girlfriend of the deceased and she testified that on 2/12/2012 at around 10.00 p.m., the deceased picked her from her place of work at Murachake Hotel in Siakago town. The two went to the house of the deceased but after a short while the deceased left saying that he was taking a mobile phone to a friend in the neighbourhood. PW6 then heard some noise outside the house and went to check what was happening. She found the deceased lying on the ground as the accused stood near him holding a piece of stick and also something that looked like a knife. There were some people at the scene who had come to separate them. She testified that the deceased had a stab wound in the stomach and was bleeding profusely.
4. PW6 said that she called her sister PW9 to come to the scene. She escorted PW6 to the police station to report the matter as the deceased was taken to hospital. She further testified that the scene was lighted with electricity from houses nearby. PW6 said she knew the accused before the incident for she used to see her at Siakago market and that the accused was not staying at the plot where the deceased lived.
5. The evidence of PW9 was that she was called by her sister PW6 on the material day at around 10.30 p.m. and was informed that the deceased had been stabbed by a certain woman. PW9 proceeded to the scene and found the deceased lying in a pool of blood. He had a stab wound on the left side of the chest and his t-shirt was soaked with blood. PW9 escorted her sister PW6 to Siakago police station to report the matter. While at the station the accused whom PW9 knew before the incident came with her 2 children and surrendered to the police. A mob followed her to the station baying for her blood. The accused was locked in the cells as the deceased was rushed to the hospital.
6. PW10 a police inspector from Siakago police station told the court that he was in his house at around 10.00 p.m. on the material day when the accused telephoned him saying that she had been confronted by a man whom she knew. The man was armed with a wooden stick and a knife. The accused said that she

had defended herself in the attack and that the man was lying at the scene unconscious.

7. Before PW10 left his house, the accused called him again and reported that a mob wanted to attack her. PW10 advised her to go to the police station and seek refuge there. She was received by Cpl. Muthiga and locked in the cells. PW10 went to the police station and later to Siakago District hospital where he found the deceased surrounded by nurses. He was informed that he had passed on awaiting treatment. PW10 said that he made arrangements for the body to be taken to Siakago District hospital mortuary.

8. When PW10 returned to the police station, he found a hostile mob threatening to burn the station. He called for reinforcement and drove away the mob who were already throwing stones. The CID Mbeere North took over the investigations of the case.

9. PW11 Dr. Phyllis Mohonja produced the postmortem report of Dr. Thuita. The cause of death was cardiopulmonary arrest caused by bleeding into the pericardial sac as a result of the stab wound penetrating into the heart caused by a sharp object.

10. PW4 Dr. Joseph Thuo a psychiatrist at Embu Level 5 Hospital produced the mental assessment report certifying that the accused was fit to plead to the criminal charge.

11. The accused person gave an unsworn statement of defence stating that on 2/12/2012 at around 10.00 p.m., the deceased who was her neighbour went to her house. He started beating her up and she ran outside whereby the deceased followed her and continued to beat her. She then pushed him away and he fell on some used timber with nails fixed on them and iron sheets. The accused then left the deceased at the scene and ran to her house where she picked her two small children. She proceeded to the police station to report the assault. She was followed there by a mob who wanted to attack her because she had killed the deceased. She was locked in the cells and later charged with the offence.

12. The defence filed submissions arguing that the prosecution did not conclusively prove that the accused caused the death of the deceased. It was argued that if at all the court finds that there was evidence to that effect, the accused ought to be convicted with the offence of manslaughter as opposed to the charge of murder. This is because it is the deceased who attacked her in her house and that she had to defend herself. The prosecution did not adduce any evidence to prove malice aforethought on the part of the accused.

13. The evidence of PW6 was to the effect that she found the deceased lying at the scene with a bleeding wound in the stomach. Blood was oozing through the t-shirt he wore. The accused was there holding a stick and a sharp object looking like a knife.

14. PW9 also went to the scene and found the crowd there. She saw the deceased lying helplessly as he bled from the chest. She stated that she was the one who escorted PW6 to the police station to report the matter.

15. PW10 testified that he is the one who advised the accused to take refuge at the police station to escape the wrath of the mob. He confirmed that the mob followed the accused to the police station and threatened to burn the station.

16. In her defence the accused admitted that there was a confrontation between her and the deceased. Her defence was that she pushed him and he fell on some timber with nails and on iron sheets suggesting that the deceased was injured when he fell down.

17. The court did not believe the defence of the accused that she only pushed the deceased and he fell. The injury the deceased sustained was a stab injury on the chest caused by a sharp object. The postmortem report established the cause of death as the stab wound. The evidence against the accused is purely circumstantial evidence.

18. The court will be guided by the principles laid down in regard to circumstantial evidence for none of the witnesses was present when the deceased was stabbed.

19. In the case of **SAWE VS REPUBLIC [2003] eKLR 365** the Court of Appeal held that:-

*(1) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.*

*(2) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.*

*(3) The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.*

20. In the case of **MUCHENE VS REPUBLIC [2002] eKLR 367** the Court of Appeal held that:-

*(1) It is trite law that where a conviction is exclusively based on circumstantial evidence such conviction can only be properly upheld if the court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant but also that there exist no co-existing circumstances which would weaken or destroy such inference.*

*(2) It is settled law that the burden of proving facts which justify the drawing of such inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains as such.*

21. In this case the accused was found at the scene holding a stick and an object that looked like a knife. She owned up PW10 that she had stabbed someone and was in danger of being lynched by the mob. The said mob followed the accused to the police station where she had been advised to take refuge by PW10. In her defence, the accused admitted there was a confrontation between her and the deceased. There was no possibility of the deceased being injured elsewhere apart from the scene where PW6 found the deceased having been stabbed. There is evidence that places the accused at the scene.

22. The foregoing inculpatory facts are not only inconsistent with the accused's innocence but also demonstrate that there existed no other circumstances to destroy the inference that it is the accused who inflicted the stab wound which killed the deceased.

23. I find that the prosecution have proved that it is the accused who caused the death of the deceased through the unlawful act of stabbing him.

24. I now proceed to determine whether there was malice aforethought on part of the accused at the time she inflicted the fatal injury on the deceased. Malice aforethought is defined under Section 206 of the Penal Code as follows:-

*Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—*

*(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit a felony;*

*(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

25. The prosecution did not adduce any evidence that the infliction or that the accused had knowledge that the act of stabbing would cause death. Malice aforethought was not therefore proved.

26. The accused pleaded the defence of provocation but did not adduce any evidence to support that defence.

27. PW6 testified that the accused and the deceased were fighting. The accused was found at the scene holding two weapons namely a stick and some sharp object believed to be a knife. It was not clear who among the two had initially brought what weapon with them before the deceased was stabbed. However, the evidence of PW6 was fortified by the defence of the accused that the two were fighting and that the deceased is the one who attacked her. She said the accused was armed when he went to her house.

28. In the absence of proof of malice aforethought I find that the charge of murder has not been proved.

29. It is my finding that the evidence on record proves beyond any reasonable doubt a lesser charge of manslaughter against the accused person.

30. I find her guilty of manslaughter contrary to Section 205 of the Penal Code and convict her accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF NOVEMBER, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms Nandwa for the State**

**Mr. Okwaro for accused**

**Accused present**